No. 731

IN THE

Supreme Court of the United States

October Term, 1945.

HENRY GREENBERG,

Petitioner,

vs.

I. & I. HOLDING CORPORATION and HARRY BARROW, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Henry Greenberg, a bankrupt, respectfully prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Second Circuit entered November 5, 1944, reversing an order of the United States District Court for the Eastern District of New York. A certified transcript of the record in the case, including the opinion in the Circuit Court of Appeals, is furnished herewith in accordance with the rules of this Honorable Court.

Opinions Below.

The opinion of the court below filed November 5, 1945, is not yet reported and for convenience is printed in the certified Record (pp. 48-52). The District Court filed a memorandum opinion on the question involved and the same is printed in full in the Record (R. 115, 116).

Basis of Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 A). The date of the opinion of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was November 5, 1945. Application for stay of mandate pending application in this Court for writ of certiorari was made December 14, 1945, and order staying the mandate pending the application for writ of certiorari in this Court was entered December 19, 1945.

Questions Presented.

The fundamental question presented in this petition is whether a Referee in Bankruptcy, having before him a petition for an arrangement filed by the debtor under Section 321 of Chapter XI of the Chandler Act (11 U. S. C. A. Section 721) in the bankruptcy proceeding which has never been closed, has no discretion, but must dismiss this petition, when the bankrupt has previously been denied a discharge by the same Referee after a contest on the merits in the bankruptcy proceeding on the ground that he had committed acts barring a discharge under the Bankruptcy Act, and the Referee's original order has also been affirmed by the District Court prior to the time of the filing of the petition for arrangement.

The fundamental nature of the foregoing question when considered from a jurisdictional standpoint is clari-

fied by the circumstance that it raises this issue: Must the debtor relief court on its own motion summarily dismiss such petition without either requiring the creditors to offer proof at a hearing of their objections to said petition or permitting the Referee upon the basis of the proof offered therein to rule upon the validity of these objections?

As particularly applied to the statute under which the petition for arrangement was filed, the question is whether under (Section 321 of Chapter XI of the Chandler Act; 11 U. S. C. A., Section 721) denial of a discharge in a pending bankruptcy proceeding precludes the bankrupt from obtaining confirmation of a plan of arrangement thereafter presented in the same proceeding.

A corollary to this question is the query: Is the denial of a discharge to a bankrupt in the bankruptcy proceeding *res judicata* in the same proceeding except by way of review or appeal?

A collateral jurisdictional issue is presented in this case by the fact that the debtor at the time of filing the petition for arrangement resided in a federal judicial district other than that in which the original bankruptcy proceeding was pending; with the consequence, that whereas it may be conceded, for the sake of argument merely, that the original court might be compelled to take judicial notice of its own records, the court of the federal district in which the debtor now resides would have had to be apprised through competent and duly tested proof, and not from judicial notice, of the alleged lack of right in the debtor to the benefits of Chapter XI of the Chandler Act (11 U. S. C. A. Section 701 *et seq.*). The question presented by this situation is whether the debtor has not suffered undue discrimination within the meaning of the "due process clause" of the Fifth Amendment to the Constitution of the United States?

A related question is whether the Referee in the original proceeding must not be constrained to pass upon the merits of the creditors' objections. These would be duly offered at a hearing through direct and cross-examination in order to obviate grave constitutional doubts as to the validity of the interpretation placed by the opinion, herein sought to be reviewed, upon Section 321 *et seq.*, of the Chandler Act (11 U. S. C. A. Section 721 *et seq.*).

A further related question is whether this constraint should not be imposed upon the Referee in the original proceeding in order to eliminate efforts by bankrupts through change of residence to avail themselves more readily of the benefits of the debtor relief proceedings of the Chandler Act. By filing these petitions initiating such proceedings under Section 322 of the Chandler Act in other federal courts, more than judicial notice of previous proceedings is called for as proof of the debtor's disqualification for a discharge.

Summary Statement.

The essential facts, which are undisputed, are contained in the opinion of the Circuit Court of Appeals for the Second ~~District Court~~ CIRCUIT and the Circuit Court of Appeals HELD upon the objections of respondents, as creditors, that the Referee in Bankruptcy had no jurisdiction to consider the petition for arrangement filed by the bankrupt under Chapter XI, as he had theretofore been denied a discharge by the said Referee under the Bankruptcy Act and the order of the Referee denying the discharge had been affirmed by the District Court.

Upon an involuntary petition in bankruptcy, Henry Greenberg was adjudicated bankrupt on December 29, 1939 (R. 40). After a hearing on specifications in opposition to a discharge before the Referee, he sustained the objections and denied the discharge (R. 41). This denial was on the ground that the bankrupt had committed acts bar-

ring his discharge under the Bankruptcy Act, and the Referee's order was ultimately affirmed by the District Court in August 1942 (R. 34-39, 63, 80); (*In re Greenberg*, 46 F. Supp. 289).

The bankruptcy proceeding, however, was not, and never has been, closed (R. 19, 41). Accordingly, on June 30, 1944, the bankrupt filed in the bankruptcy proceeding a petition for arrangement of his debts offering to unsecured creditors who were not entitled to priority the payment of one per cent. in cash (R. 101-405). This petition showed that the debtor had not resided in the Eastern District of New York for any portion of the six months immediately preceding the date of the filing of the said petition and had in fact not resided therein for at least three years previously thereto (R. 64). Pursuant to Section 334 of the Chandler Act, 11 U. S. C. A. Section 734, the Referee gave notice of a meeting of creditors to consider the plan of arrangement (R. 94). Before the date so set, I. & I. Holding Corporation, one of the respondents herein, and a creditor of the bankrupt, filed with the Referee a petition asking dismissal of the bankrupt's petition for an arrangement on the ground that the aforesaid denial of a discharge in bankruptcy precluded him from obtaining such relief (R. 106-111), and asserting specifically that said denial was *res adjudicata* as to said petitioning creditor's claim (R. 108).

There was a hearing on the plan (R. 17, 102-105). Thereafter the Referee entered an order vacating all proceedings theretofor had in the bankruptcy proceeding and confirmed the debtor's plan of arrangement (R. 16-30). This order came before the District Court on petitions for review filed respectively by I. & I. Holding Corporation (R. 7-15) and Harry Barrow, Inc. (R. 52-67), the objecting creditors, and the respondents herein. The debtor conceded (R. 112-114) that the proceedings before the Referee had been irregular in failing to give to cred-

itors the statutory notices required by Section 337 (3) of the Chandler Act, 11 U. S. C. A. Section 737 (3). Thereupon, the District Court referred the proceedings back to the Referee to set a date for the hearing on confirmation of the plan of arrangement, to fix a time for the filing of specifications of objection to confirmation, and for "all other purposes including the right of objecting creditors to raise the issue of law as they may be advised that the denial of a discharge to a bankrupt in the bankruptcy proceedings is *res adjudicata*, except by way of review or appeal" (R. 115-116).

Appeal was taken from this order by the objecting creditors, respondents herein, to the Circuit Court of Appeals. Although the Circuit Court cited several opinions of its own, which recognized the rule that appellate courts usually will not consider appeals from interlocutory orders of reference which decide nothing as to the merits of a dispute, that Court, nevertheless, allowed the appeal and reversed the order with directions to dismiss the debtor's petition.

Reasons Relied on for Allowance of the Writ.

1. The question involved in this appeal is vital in the administration of the Bankruptcy Act. Hundreds, if not thousands, of neccessitous bankrupts are denied discharge annually because of some alleged violation of the discharge provisions of Section 14 of the Chandler Act, 11 U. S. C. A. Section 32. The expense of applying for the vacation of orders denying such discharge or of having them reversed by way of review or of appeal are frequently unduly burdensome, if not, absolutely prohibitive. Must a bankrupt exhaust these remedies before he may file a petition in accordance with the Chandler Act for arrangement under Chapter XI or a Wage Earners' Plan under Chapter XIII? The Circuit Court of Appeals for the Second Circuit has directly answered the first half of

this question in the affirmative and by inescapable implication has given an identical answer to the second half. This Court according to the diligent research of counsel has never ruled on the proposition involved in these questions and it is respectfully urged that a decision on the problem is of prime importance in a genuinely equalitarian bankruptcy administration. As accurate a tribunal as is the Circuit Court of Appeals for the Second Circuit, it is submitted, would not have emphasized at the very outset of its opinion the observation of counsel that the question involved herein is one of first impression if independent judicial scrutiny of the authorities had not led to the conviction that counsel's remark was true.

2. Section 321 of Chapter XI of the Chandler Act, 11 U. S. C. A. Section 721, is an important statute in the body of the Bankruptcy Act, as added on June 22, 1938, by C. 575 Section 1, 52 Stat. 907.

This section reads:

> "*Filing petition; pending bankruptcy proceeding.*
>
> "A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication."

There is no provision in this section forbidding a bankrupt who has been denied a discharge in bankruptcy from filing a petition for arrangement.

3. Section 621 of Chapter XIII of the Chandler Act, 11 U. S. C. A. Section 1021, applicable to "Wage Earners' Plans," is identical in phraseology with Section 321 of Chapter XI, 11 U. S. C. A. Section 721 and its interpretation is indubitably controlled by the opinion of the Circuit Court of Appeals herein sought to be reviewed.

4. The decision of the Circuit Court of Appeals for the Second Circuit in the instant case is such an unqualified departure from the policy underlying the radical amendments made to the Bankruptcy Statute by the Chandler Act of June 22, 1938, as to call for the exercise by this court of its power of supervision.

5. The decision of the Circuit Court of Appeals for the Second Circuit, is a violation, based upon past analogies interpreting the Bankruptcy Act of 1898 and its amendments, of the present policy of The Congress to afford through the Bankruptcy Statute an inexpensive medium for the rehabilitation of the debtor.

6. The decision of the Circuit Court of Appeals constitutes discrimination against this debtor within the meaning of the "due process" clause of the Fifth Amendment to the Constitution of the United States (*Detroit Bank* v. *United States,* 317 U. S. 329, 338). Under the opinion of *Bluthenthal* v. *Jones,* 208 U. S. 64, it would be the duty of the objecting creditors to plead or to bring to the attention of the court of the federal district in which this debtor resides, the conclusive adjudication of the alleged lack of right in the debtor to a discharge under Chapter XI of the Chandler Act. The duty to plead denotes that the correlative burden of adducing proof or of otherwise bringing to the attention of the Court the conclusive adjudication of the debtor's right to a discharge rests upon the creditors; and that, to participate in the proceedings, they must establish the continued provability of their own claims. The decision below imposes the duty upon the court of one federal district to dismiss the proceeding *in limine.* This duty, however, can not thus be imposed upon the court of the federal district in which this debtor resides, in the absence of pleading or proof offered at a hearing to establish the defense. Hence, in

one instance, the debtor has his day in court whereas in the other he does not. Section 321 should therefore be construed to avoid this grave constitutional issue (*United States* v. *Jin Fuey Moy*, 241 U. S. 394).

Prayer.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding said court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals for the Second Judicial Circuit reversing the order of the District Court be reversed and remanded and that petitioner be granted such other and further relief as may seem proper.

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